No. 17-1702

In the
Supreme Court of the United States

MANHATTAN COMMUNITY ACCESS CORPORATION; DANIEL COUGHLIN; JEANETTE SANTIAGO; CORY BRYCE,

Petitioners,

v.

DEEDEE HALLECK; JESUS PAPOLETO MELENDEZ,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE AND BRIEF FOR *AMICUS CURIAE* CHICAGO ACCESS CORPORATION IN SUPPORT OF PETITIONERS

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July 25, 2018

MOTION FOR LEAVE TO FILE *AMICUS* BRIEF

Amicus Chicago Access Corporation (CAC) respectfully moves for leave of Court to file the accompanying brief in support of the petition for writ of certiorari in the above-captioned case. Petitioners have consented to the filing of this brief. Due to an oversight, *amicus* provided notice to respondents six days before the filing deadline, rather than the 10 days specified in Supreme Court Rule 37.2. For that reason, respondents have declined to consent to this filing.

The principal purpose of this Court's 10-day notice requirement is to allow respondents time to seek an extension of time for their brief in opposition should they want to review and respond to arguments made by *amici* supporting the petition. Here, when *amicus* notified respondents of its intent to file, respondents already had sought and received a 30-day extension of time, which they had requested on the ground that "an *amicus* brief will be filed in this matter." Letter from Paul W. Hughes to Scott S. Harris (July 18, 2018). Accordingly, *amicus* does not believe that respondents have suffered any prejudice on account of the inadvertent delay in providing notice.

CAC is a local, community-based 501(c)(3) private foundation tasked with managing public-access television channels in Chicago, Illinois. CAC owns and operates Chicago Access Network Television (CAN TV), which was established 35 years ago to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community. CAC is a non-

governmental, non-commercial, non-tax-supported foundation that seeks to promote and develop maximum public awareness of, usage of, and involvement in television for educational, cultural, civic, health, social service, and other non-profit purposes. To that end, CAC provides technical training, video equipment, studio facilities, television program channel time, and online hosting of unique non-commercial video content not typically accessible through commercial mass media outlets. CAC submits this *amicus* brief because the decision below threatens the viability of CAN TV and public-access channel operators around the country.

Amicus respectfully moves this Court for leave to file the accompanying brief in support of the petitioners.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amicus Chicago Access Corporation (CAC) is a local, community-based 501(c)(3) private foundation tasked with managing public-access television channels in Chicago, Illinois. CAC owns and operates Chicago Access Network Television (CAN TV), which was established 35 years ago to provide ordinary, work-a-day Chicagoans with an otherwise unattainable digital media platform to engage with their community. CAC is a non-governmental, non-commercial, non-tax-supported foundation that seeks to promote and develop maximum public awareness of, usage of, and involvement in television for educational, cultural, civic, health, social service, and other non-profit purposes. To that end, CAC provides technical training, video equipment, studio facilities, television program channel time, and online hosting of unique non-commercial video content not typically accessible through commercial mass media outlets. CAC submits this *amicus* brief because the decision below threatens the viability of CAN TV and public-access channel operators around the country.

SUMMARY OF ARGUMENT

The Second Circuit's decision is wrong on the merits, creates one circuit split, implicates another, and worst of all, threatens the future of public-access television. This Court should grant certiorari, clarify the correct approach to determining whether private

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

conduct can be treated as state action, and hold that private operators of public-access television channels do not engage in state action when they exercise their editorial discretion to provide a local and community-based television experience.

I. This Court has "used many different tests to identify state action." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 306 (2001) (Thomas, J., dissenting). The Second Circuit ignored every single one of them. Instead of asking whether the conduct alleged to be unconstitutional could "fairly be attributed to the State," *id.*, the Second Circuit focused on *where* that conduct occurred—*i.e.*, on whether it occurred somewhere that would be a public forum if it were operated by the government. Then, after determining (incorrectly) that a privately owned public-access channel would be a public forum, the panel majority reasoned that the defendant must be a state actor because "facilities or locations deemed to be public forums are usually operated by governments." Pet.App.14. That circular reasoning is self-evidently wrong and conflicts with decisions from the Sixth and D.C. Circuits, both of which have correctly concluded that operating a privately owned public-access channel is not state action.

II. The decision below presents another issue with which lower courts have struggled and on which members of this Court have disagreed—namely, whether private property may be designated a public forum. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), members of this Court divided on that question. Three Justices would have held that private

property can never be a public forum; two Justices would have held that public-access channels are public forums notwithstanding their private ownership; and four Justices declined to answer the question. The decision below explicitly adopts "the view expressed by Justices Kennedy and Ginsburg in *Denver Area*." Pet.App.17. Thus, to the extent there is state action here (or to the extent the public-forum question informs the state-action question), this case presents a perfect opportunity to resolve the still-unsettled issue of whether private property can ever be a public forum.

III. Certiorari is warranted not just because those questions are recurring and important, but also because the decision below threatens the viability of public-access television. As the exclusive operator of five privately owned cable television channels, CAN TV could not survive in its current form if the dozens of editorial decisions it makes every day—for example, which programs to air on which channels and at which times—were all subjected to public-forum scrutiny in federal court. And as a non-profit foundation working with a perennially modest and chronically tenuous operating budget, CAN TV could not survive in its current form if it were treated as a "state actor" for purposes of the Illinois Freedom of Information Act, Illinois Open Meetings Act, and similar laws that impose administrative burdens well beyond those with which a non-profit foundation could feasibly comply. This Court should grant certiorari to clarify this area of the law and to reject the Second Circuit's reasoning before it takes root and threatens the very existence of public-access television.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Cannot Be Reconciled With This Court's Precedents And Opens A Circuit Split Over Whether Operating A Public-Access Channel Is State Action.

A. To determine whether a defendant has violated the Constitution, a court must first decide whether the challenged action was "state action"—or, in a case filed under 42 U.S.C. §1983, was taken "under color of state law." *See Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982) ("In cases under §1983, under color of law has consistently been treated as the same thing as the state action required under the Fourteenth Amendment."). The state-action requirement ensures "that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). This Court has formulated a variety of tests for determining whether the actions of a private party can be fairly attributed to the State. *See Brentwood*, 531 U.S. at 296. Most prominently, as explained in the petition, this Court has used a "public function" test, a "compulsion" test, and a "joint action" test. Pet.13-15.

If the challenged action can be fairly attributed to the state under one of those tests, then the court typically must determine what level of constitutional scrutiny applies. In the First Amendment context, this Court has endorsed a "forum based" approach, under which the level of constitutional scrutiny depends on the character of the property on which the government has taken the challenged action. *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S.

672, 678 (1992). Thus, to evaluate whether challenged state action violates the First Amendment (directly or as incorporated against the states by the Fourteenth Amendment), a court must decide which type of forum is at issue. *See id.* at 678-83. Critically, those two inquiries—state-action analysis and forum analysis—are distinct. Before deciding whether challenged actions involve a public or nonpublic forum, "one must decide whether those actions may be attributed to the government" at all. *All. for Cmty. Media v. FCC* ("*ACM*"), 56 F.3d 105, 113 (D.C. Cir. 1995), *aff'd in part, rev'd in part sub nom. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

Faithfully applying that settled law, the Sixth and D.C. Circuits have rejected claims like the claims pressed here at the first step of the analysis, "rul[ing] that the operator of a cable system carrying a public access channel was not a state actor." Pet.App.16 n.8 (citing *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir. 2007)); *see also ACM*, 56 F.3d 105. In *Wilcher*, the Sixth Circuit applied this Court's three established state-action tests and concluded that the defendant's new submission rules were not state action because: 1) public-access broadcasting is not "a function traditionally reserved to the state"; 2) city officials did not "coerc[e]" the defendant to change its rules; and 3) there was no "sufficiently close nexus" between the city and the defendant. *Wilcher*, 498 F.3d at 519-21; *see* Pet.24-25. Having determined that there was no state action, the Sixth Circuit found no need to address Wilcher's argument that public-access channels are public forums. *See* Br. for Appellant at 19, *Wilcher v. City of Akron*, 498 F.3d 516 (6th Cir.

Nov. 13, 2006) (arguing that public-access channels "are designated public fora, and that any content restriction necessarily must pass strict scrutiny").

The *en banc* D.C. Circuit took the same approach and reached the same result in *ACM*. The question there was whether a cable operator's decisions about programming on a public-access channel should be treated as state action. 56 F.3d at 112-13. Like the Sixth Circuit, the D.C. Circuit applied this Court's state-action tests and found state action lacking. There was no state action under the "public function" test because "determining what programs shall be shown on a cable television system is not traditionally within the exclusive province of government." *Id.* at 113. There was no state action under the "compulsion" test because the relevant statue merely allowed—*i.e.*, did not require—cable operators to ban indecent programming. *Id.* at 113, 116. And there was no state action under the "joint action" test because there was not a "sufficiently close nexus" between the cable operator and the government. *Id.* at 115; *see* Pet.26-28.

B. The decision below stands in stark contrast to *Wilcher* and *ACM*. Expressly parting ways with the Sixth and D.C. Circuits, the panel majority concluded that MNN, a private corporation, engaged in "state action" when it temporarily suspended plaintiffs from airing programs on MNN's public-access channels. Notably, the majority did not reach that conclusion by applying any of this Court's tests for determining whether the actions of a private entity can fairly be attributed to the state. *See Brentwood*, 531 U.S. at 296. Instead, the majority skipped ahead to the forum

question and then bootstrapped its (incorrect) answer to that question into an (incorrect) answer to the state-action question. Neither that reasoning nor the result it produced can be reconciled with *Wilcher*, *ACM*, or this Court's state-action precedents.

The majority started off on the right foot, stating that "the viability of the Plaintiffs' First Amendment claim ... depends on whether MNN's actions can be deemed state action," and then citing *Brentwood* for the proposition that a private defendant "can be a state actor in several different circumstances." Pet.App.9. But instead of addressing the state-action question or applying the state-action tests outlined in *Brentwood*, the majority then turned immediately to the forum question. Indeed, the majority's very next sentence (and next eight paragraphs of analysis) were about "whether the public access channels in the pending appeal are public forums." Pet.App.10-14. Then, after focusing principally on the extent to which they are held open to the public for use, the court concluded that public-access channels are public forums because "[a] public access channel is the electronic version of the public square." Pet.App.13. *But see* Pet.App.27 (Jacobs, J., dissenting in part) ("not every well-turned phrase is good law").

The majority did not return to the state-action question until after it had decided that public-access channels are public forums. And when it did so, it still did not apply any of this Court's tests for state action. Instead, it treated the public-forum holding as all but dispositive of the state-action question. In the court's view, because "locations deemed to be public forums are usually operated by governments," and because

there was a (very tenuous) connection between MNN and the state, MNN is a state actor. Pet.App.14. To be clear, the court did not apply the "public function" test, the "compulsion" test, the "joint action" test, or any other test this Court has endorsed. Instead, the majority concluded that anything anyone does in a forum that, if operated by the government, would be a "public forum" is *ipso facto* state action, provided there is at least some ostensible connection between the actor and the government—even when that connection is not enough to satisfy any of the state-action tests. *See* Pet.App.23-26 (Jacobs, J., dissenting in part).[2]

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[2] Judge Lohier attempted to shore up the majority opinion by applying the "public function" test in his concurrence; he opined that "[a] private entity's regulation of speech in a public forum is a public function." Pet.App.19. That analysis, however, is at far too high a level of generality. The "public function" test focuses on the *specific function* the private person or entity is serving, and the question is whether that specific function is the traditional and exclusive prerogative of the State. Thus, in *Jackson v. Metro. Edison Co.*, this Court did not ask the high-level question of whether providing "essential public service[s]" was a public function, but rather asked whether "the furnishing of *utility services*" was a traditional and exclusive government function. 419 U.S. 345, 353 (1974) (emphasis added). Likewise, in *Rendell-Baker*, this Court did not ask whether public education generally was a traditional function of government; it instead rejected a state-action argument because providing special education for "maladjusted high school students" was not a traditional and exclusive province of government. 457 U.S. at 842. Instead of asking whether "regulation of speech in a public forum" is a traditional and exclusive public function, Judge Lohier should have asked the narrower question of whether operating a public-access television channel is a traditional and exclusive public function—it is not. *See* Pet.17.

That circular reasoning essentially collapses the distinct state-action and forum inquiries. In effect, the Second Circuit reasoned that because "locations deemed to be public forums are usually operated by governments," Pet.App.14, everything that looks like a public forum should be treated as if it were operated by the state. But that mistakenly assumes that it is the nature of the forum, not the nature of the party operating it, that determines whether the First Amendment applies. In fact, what makes a forum "public" for First Amendment purposes is not just that it is "devoted to assembly and debate," *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), but that it is held open for those purposes *by the state*.

Indeed, the whole point of the public-forum doctrine is to assess the validity of "restrictions that *the government* seeks to place on the use of *its* property." *Int'l Soc'y for Krishna Consciousness*, 505 U.S. at 678 (emphasis added). Those rules classify public property into separate categories of forums, and "the extent to which *the Government* can control access depends on the nature of the relevant forum," *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985) (emphasis added). To assume that a *private* party is subject to the same rules as a state actor simply because it operates its property like a public forum would read the state-action requirement right out of the law.

The decision below thus not only reached the wrong result, but did so through reasoning that threatens to fundamentally disrupt public-forum law. The court reached that result, moreover, in open and

acknowledged conflict with decisions from the Sixth and D.C. Circuits. *See* Pet.App.16 & n.8; Pet.App.19 (Lohier, J., concurring) (noting that "[o]ther courts have [the] view" that public-access channels are not state actors); Pet.App. 33 (Jacobs, J., dissenting in part) ("The majority conclusion that MNN is a state actor opens a split with the Sixth Circuit."). This Court should grant certiorari to resolve that conflict and reject the Second Circuit's dangerous conflation of the distinct state-action and forum inquiries.

II. The Decision Below Implicates A Division In The Lower Courts About Whether Private Property Can Be A Public Forum.

The circular manner in which the Second Circuit resolved this case is all the more problematic because it glosses over a key threshold issue that has divided lower courts and members of this Court—namely, whether *private* property can ever be a public forum. As the majority acknowledged, a public-access channel is private, not government, property. *See* Pet.App.12. "The channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." *ACM*, 56 F.3d at 122. Yet in the majority's view, this concededly private property, operated by a concededly private party, nonetheless could be deemed a public forum because it is "the electronic version of the public square." Pet.App.13. This case thus presents an opportunity to resolve the unsettled and recurring question of whether private property can ever be a public forum.

In *ACM*, the *en banc* D.C. Circuit considered whether public-access channels are public forums. 56 F.3d at 121-23. Relying on several of this Court's First Amendment precedents, the *en banc* majority concluded that public-access channels could not be public forums because they are not government property: "[A] 'public forum,' or even a 'nonpublic forum,' in First Amendment parlance is government property." *Id.* at 121. "It is not ... a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee." *Id.* Because public-access channels are not owned by the government, the *en banc* majority concluded that they are not public forums. *Id.* at 123. In support of that holding, the *en banc* majority cited nearly a dozen of this Court's public-forum cases, all of which involved government property. *See id.* at 122 n.17.

When this Court reviewed the D.C. Circuit's opinion, members of this Court disagreed over whether private property could be a public forum, but ultimately left the question unresolved. *See Denver Area*, 518 U.S. 727. Justice Thomas, joined by Chief Justice Rehnquist and Justice Scalia, took the position that "[t]he public forum doctrine is a rule governing claims of a right of access to *public property*, and has never been thought to extend beyond property generally understood to belong to the government." *Id.* at 827 (emphasis added) (citation omitted). As Justice Thomas explained, all of this Court's "public forum cases have involved property in which the government has held at least some formal easement or

other property interest permitting the government to treat the property as its own in designating the property as a public forum." *Id.* at 828. And because "nothing in the record suggests that local franchising authorities take any formal easement or other property interest" in public-access channels, the government may not "designate that property as a public forum." *Id.*

Justice Kennedy, joined by Justice Ginsburg, took the opposite view. According to Justice Kennedy, public-access channels "are public fora even though they operate over property to which the cable operator holds title." *Id.* at 792; *see id.* ("Public fora do not have to be physical gathering places, nor are they limited to property owned by the government.") (citation omitted). Justice Kennedy pointed out that public-access channels are "[r]equired by the franchise authority as a condition of the franchise," and stated that "when a local government contracts to use private property for public expressive activity, it creates a public forum." *Id.* at 792, 794. In support of the proposition that public fora are not "limited to property owned by the government," Justice Kennedy cited *Cornelius*, 473 U.S. 788, which had stated (in dicta) that a public forum may consist of "private property dedicated to public use." *Id.* at 801.

Justice Thomas acknowledged the "dictum" from *Cornelius* but opined that it referred only "to the common practice of formally dedicating land for streets and parks when subdividing real estate for developments." *Denver Area*, 518 U.S. at 827. Those types of dedications "create enforceable public easements in the dedicated land," and "[t]o the extent

that those easements create a property interest in the underlying land, it is that government-owned property interest that may be designated as a public forum." *Id.* at 827-28. Because the public does not have an enforceable easement over public-access channels, Justice Thomas concluded that the language from *Cornelius* "has no applicability here." *Id.* at 827.

The issue was not resolved in *Denver Area* because the plurality opinion declined to weigh in. The plurality found it unnecessary to decide whether public-access channels are public forums, instead resolving the case on other grounds: "We therefore think it premature to answer the broad questions that Justices Kennedy and Thomas raise in their efforts to find a definitive analogy, deciding, for example, the extent to which private property can be designated a public forum." *Id.* at 742.

The disagreement between members of this Court over whether private property can be a public forum has produced divergent results in the lower courts. For example, the Ninth Circuit has considered whether "a sidewalk constructed on private property to replace a public sidewalk ... is a public forum subject to the protections of the First Amendment." *Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas*, 257 F.3d 937, 939 (9th Cir. 2001). The panel majority concluded that the sidewalk was a public forum, notwithstanding its private ownership, because it was "seamlessly connected to public sidewalks at either end and intended for general public use." *Id.* at 948. In dissent, Judge Brunetti insisted that "the majority has extended the First

Amendment far beyond its intended reach and has undermined the rights of private property owners." *Id.* at 958.

The Tenth Circuit, when presented with a similar question, came up with a different answer. *See Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1252 (10th Cir. 2005). In *Utah Gospel Mission*, Salt Lake City sold a block-long section of Main Street to the Church of Latter Day Saints while reserving an easement for public access. The Church prohibited demonstrations on the property, and when a group of plaintiffs sued, the Tenth Circuit initially held that the City's easement was a public forum upon which content-based restrictions on speech could not be enforced. *See First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1132 (10th Cir. 2002). But after the City went on to sell the easement to the Church as well, the Tenth Circuit held that the property was no longer a public forum. Even though the property had historically been the quintessential public forum—indeed, it was quite literally Main Street—the complete transfer of ownership to private hands was enough to eliminate its status as a public forum. *Utah Gospel Mission*, 425 F.3d at 1255-58.

As the petition points out, the question of whether private property can be a public forum has grown in importance in recent years, as courts are increasingly being asked to consider whether privately owned internet platforms like Twitter and Facebook can ever be public forums. *See, e.g.*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 566 (S.D.N.Y. 2018) ("[T]o potentially qualify as a

forum, the space in question must be owned or controlled by the government."); *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018) ("Governor Bevin's Twitter and Facebook accounts are privately owned channels of communication and are not converted to public property by the use of a public official."). This case presents an ideal opportunity to answer the unsettled and increasingly important question of whether private property can be a public forum.

III. The Decision Below Threatens The Viability of Public-Access Television.

The Second Circuit's two core holdings—that public-access channels are public forums and that the operators of public-access channels are state actors—have dramatic and deleterious consequences for public-access television. The notion that a public-access channel operator like CAC could be a state actor is immensely troubling. CAC is not the government. CAC is not a branch or extension of local, state, federal, or any other government. It is not a "sister agency" of any branch of government. None of the members of its Board of Directors is appointed or controlled by any government official. CAC is not funded by any government entity; rather, it derives its revenue from private cable operators and a video service provider (AT&T) and occasional nominal contributions from small private donations. This clear division between CAC and the government is no accident: The Chicago Municipal Code strictly forbids CAC from "[p]ermit[ting] operation of its channels to be subject to direct or indirect governmental

interference with or control of program content." Chi., Ill., Mun. Code ch. 4-280, art. VII, §370(2).

Despite the clear division between CAC and any governmental entity, CAC would likely be classified as a "state actor" under the test applied by the Second Circuit. As the petition explains, the decision below "created what is essentially a *per se* rule: public access channels are always public fora and, therefore, their private operators are state actors subject to constitutional liability." Pet.18. The only theoretical qualification to that *per se* rule was that it would apply "only" to public-access channels that are authorized by federal law, mandated by state law, and designated by a franchise authority. Pet.App.13-14. But as the petition points out, that describes almost all public-access channels in almost every state. Pet.19. For example, public-access television in Chicago is authorized by federal law, *see* 47 U.S.C. §531(b), mandated by municipal law, *see* Chi., Ill., Mun. Code ch. 4-280, art. VII, §320, and operated by CAC pursuant to a designation by the city, *id.* §310.[3]

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[3] *See also, e.g.*, Ariz. Rev. Stat. §9-506; Cal. Pub. Util. Code §5870; Centennial, Col., Mun. Code §5-3-770; Conn. Agencies Regs. §16-331a-2; Fla. Stat. Ann. §610.109; Ga. Code Ann. §36-76-8; Haw. Rev. Stat. §440G-8.3; Idaho Code Ann. §50-3010; Ind. Code §8-1-34-25; Iowa Code Ann. §477A.6; Kan. Stat. Ann. §12-2023; Paducah, Ken., Code §22-39; La. Rev. Stat. Ann. §45:1369; 30-A Me. Rev. Stat. Ann. §3010; Minn. Stat. §238.084; Mo. Ann. Stat. §67.2703; Billings, Mont., Code §7-908; Nev. Rev. Stat. §711.810; N.H. Rev. Stat. Ann. §53-C:3-a; N.J. Admin. Code §14:18-15.4; N.C. Gen. Stat. §66-357; Fargo, N.D., Code §24-0205; Ohio Rev. Code Ann. §1332.30; Okla. Stat. Ann. tit. 11, §22-107.1; 815 R.I. Code R. §010-05-1; S.C. Code Ann. §58-12-370; Tenn. Code Ann. §7-59-309; Tex. Util. Code Ann. §66.009; Vt. Stat. Ann.

The restrictions placed on the operators of public forums are severe. When operating a public forum, a state actor cannot discriminate on the basis of content and may enforce reasonable time, place, and manner restrictions only to the extent those restrictions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983); *see Denver Area*, 518 U.S. at 782 (Kennedy, J.) ("The Constitution in general does not tolerate content-based restriction of, or discrimination against, speech.").

While those limitations make sense when applied to governmental entities regulating public streets and sidewalks, they make little sense in the context of television. CAC operates five public-access cable television channels, which are organized by the predominant type of content each one features:

- CAN TV19: Local perspectives, arts, music, sports
- CAN TV21: Live call-in programs, local politics, and education
- CAN TV27: Community news and live event coverage
- CAN TV36: Religious and inspirational programming
- CAN TV42: On-demand information on jobs, housing, health, and more with audio from non-profit radio station WDCB-FM

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tit. 30, §504; Va. Code Ann. §15.2-2108.22; Seattle, Wa., Mun. Code §21.60.060; W. Va. Code Ann. §24D-1-9.

CAC and its cablecasting department require significant editorial discretion to ensure that programs air on the proper channel and in the proper timeslot. *See* Chi., Ill., Mun. Code ch. 4-280, art. VII, §370(1) (permitting CAC to "[a]llocate ... channel space and time ... on a reasonable, nondiscriminatory basis"). By exercising its discretion to optimize programming, CAN TV enhances the viewer experience, builds its audience base, and ensures that programs will be viewed by the most receptive and appropriate members of the community. *See generally* Susan Tyler Eastman & Douglas A. Ferguson, *Media Programming: Strategies and Practices* (9th ed. 2013) (discussing the importance of cable programming to securing and retaining viewership).

Subjecting CAN TV to the strictures of public-forum analysis would cripple its ability to exercise that editorial discretion. Any decision it made about when and where to air a community-submitted program would become fodder for a federal lawsuit, where CAN TV would be forced to defend its editorial choices against strict public-forum standards. Adverse court decisions or the *in terrorem* effect of costly litigation could easily dissuade CAN TV from scheduling programs based on their content or their intended audiences, which would transform CAN TV's five carefully curated channels into unpredictable and unappealing outlets without audiences.

Similarly, CAN TV could not function without the ability to exclude certain people from accessing its facilities to produce content that undermines CAN TV's work or threatens the safety of the workplace. CAN TV does not just cablecast and stream programs;

it also provides technical training, video equipment, and studio facilities for anyone seeking to produce his or her own programs. Treating CAN TV and its facilities as public forums would undermine its ability to be reasonably selective, set standards of behavior and deportment for its public patrons, and retain discretion to bar anyone it reasonably believes may be hostile toward the organization or who seeks to leverage their physical presence within the CAN TV facility toward the end of intimidating, bullying, or shaming CAN TV staff.

Treating public-access channels as state actors for purposes of §1983 lawsuits also raises the risk that they will be treated like state actors in other contexts. Such treatment would impose unmanageable burdens and strain already-tight budgets past their breaking points. Compliance with the Illinois Open Meetings Act, for example, would be administratively burdensome and practically impossible in view of CAN TV's small staff of largely part-time hourly employees. The same is true with respect to the Illinois Freedom of Information Act, which would disrupt day-to-day business operations and siphon away already-limited resources that otherwise would be devoted to serving the public. Those types of burdens might be worth the cost when imposed on government agencies, whose employees and officers are elected or appointed (and thus must remain politically accountable), and who can draw on the state fisc to meet those demands. But treating privately owned and operated non-profits like CAC as if they were state actors would make as little sense as the Second Circuit's reasons for doing so here, and would threaten the viability of public-access television across the country.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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July 25, 2018